

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL ACTION NO. 1:22-CV-00042-MOC-WCM**

**DR. JAMES MOSS MANN,
INDIVIDUALLY AND AS PARENT AND
CUSTODIAL GUARDIAN OF CMM, A
MINOR,**

Plaintiff,

v.

TRAILS CAROLINA, LLC,

Defendant.

DEFENDANT’S MOTION TO DISMISS

NOW COMES the Defendant, Trails Carolina, LLC (hereinafter “Trails Carolina”), by and through counsel, and hereby moves the Court to dismiss Plaintiff’s Complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, for failure to include the expert certification as required by North Carolina Rule of Civil Procedure 9(j). In support of this Motion, Trails Carolina states as follows:

1. Trails Carolina is a residential wilderness therapy treatment program located in Lake Toxaway, North Carolina, which provides therapeutic programs to adolescents dealing with a variety of mental health problems.

2. Trails Carolina, LLC is a health care provider as that term is defined under N.C. Gen. Stat. § 90-21.11.

3. This action involves an alleged sexual assault of minor CMM by another student while enrolled in the Trails Carolina Wilderness Therapy program.

4. In the Complaint, Plaintiff has alleged: “Trails Carolinas undertook and administered therapy, youth-development programs, activities, and services to minors, and as a result assumed a duty to CMM, Plaintiff and other students to exercise reasonable care in connection with its programs, activities, services;” [Complaint ¶ 33(a)].

5. Plaintiff has brought causes of action alleging negligence, gross negligence, and unfair and deceptive trade practice; in the aggregate, these allegations clearly amount to a medical negligence claim against Trails Carolina, a health care provider, inasmuch as Plaintiff contends that Trails Carolina failed to comply with the applicable standard of care for the same or similarly situated treatment center.

6. Plaintiff's styling of the Complaint in the form of a negligence, gross negligence, and unfair and deceptive trade practice action and/or the omission of any reference to N.C. Gen. Stat. §§ 90-21.11, 90-21.12, or any of the related statutes, does not change the substance of Plaintiff's malpractice allegations against Trails Carolina.

7. Plaintiff still has not pled facts that give rise to anything but a medical malpractice claim and Plaintiff has wholly failed to satisfy the Rule 9(j) of the North Carolina Rules of Civil Procedure applicable to medical malpractice actions such as the present matter.

8. Rule 9(j) of the North Carolina Rules of Civil Procedure is applicable in federal court and a plaintiff's failure to comply with Rule 9(j) is grounds for dismissal of a state medical-malpractice claim filed in federal court.

9. As such, Plaintiff has failed to state a claim upon which relief can be granted, and the Complaint should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

10. Further, Plaintiff has brought an action in the name of a minor without first obtaining appointment of a guardian ad litem as required by North Carolina law. Therefore, the claims on behalf of the minor should be dismissed pursuant to Rule 12(b)(1) as Plaintiff currently lacks standing to assert claims for the minor.

WHEREFORE, Defendant Trails Carolina respectfully requests that the Court dismiss this action for failure to state a claim upon which relief can be granted, pursuant to Rules 12(b)(1) and 12 (b)(6) of the Federal Rules of Civil Procedure.

This the 25th day of April, 2022.

**HEDRICK GARDNER KINCHELOE &
GAROFALO LLP**

By: /s/ Kristy D' Ambrosio

DAVID L. LEVY

NC State Bar No. 34060

KRISTY M. D'AMBROSIO

NC State Bar No. 52817

6000 Fairview Road, Suite 1000

Charlotte, NC 28210

Phone: 704-366-1101

Fax: 704-366-6181

dlevy@hedrickgardner.com

kdambrosio@hedrickgardner.com

***Attorneys for Defendant Trails Carolina,
LLC***

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document *Defendant's Motion to Dismiss* was served upon all counsel of Record via ECF as follows:

Shaun C. Blake (NC Bar #35819)
Jenkins M. Mann (pro hac vice pending)
Rogers Lewis Jackson Mann & Quinn LLC
1901 Main Street, Suite 1205
Columbia, SC 29201
sblake@rogerslewis.com
jmann@rogerslewis.com
F: (803) 252-3653
Attorneys for Plaintiff

This the 25th day of April, 2022.

/s/ Kristy M. D'Ambrosio
KRISTY M. D'AMBROSIO
NC State Bar No. 52817